MOTION FILED
OCT 6 2003

(2)

No. 03-342

IN THE

Supreme Court of the United States

DENISE ARGUELLO and ALBERTO GOVEA,
Petitioners,

v.

CONOCO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DENNIS COURTLAND HAYES *
ANGELA CICCOLO
HANNIBAL WILLIAMS II KEMERER
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland
(410) 580-5777

* Counsel of Record

October 6, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

22 pp

IN THE

Supreme Court of the United States

No. 03-342

DENISE ARGUELLO and ALBERTO GOVEA,
Petitioners,

v.

CONOCO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rules 33.1 and 37.2(b), your *amici* hereby seek leave of court to file the enclosed Brief for the National Association for the Advancement of Colored People As Amicus Curiae in Support of Petitioners (hereinafter "brief").

Petitioners, Denise Arguello and Alberto Govea, consent to the filing of the attached amicus brief while Respondent, Conoco, Inc., is opposed. A representative of the NAACP Legal Department contacted Paulo McKeeby of Littler Mendelson, P.C. to inquire about whether Respondent opposed the filing of the present amicus curiae brief on September 29, 2003. Mr. McKeeby returned the call the same day and informed the NAACP representative that Conoco, Inc. was opposed to the filing of any amicus brief in support of the Petitioners.

The NAACP hereby incorporates by reference the Interest of Amici Curiae as if fully set forth herein. Moreover, the NAACP notes that it has pending Title II cases. *See e.g. NAACP Conway Branch, et al. v. Shawnee Development Inc., et al.*, No. 4-03-1733-12 (D.S.C. filed May 20, 2003); *NAACP v. Cracker Barrel Old Country Store, Inc.*, No. 4:01-CV-325-HLM (N.D. Ga. filed Apr. 11, 2002). Therefore, the NAACP is constrained by both its conscience and practical considerations to seek this Court's leave to file an amicus brief in this matter.

Respectfully submitted,

DENNIS COURTLAND HAYES *
ANGELA CICCOLO
HANNIBAL WILLIAMS II KEMERER
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland
(410) 580-5777

* Counsel of Record

October 6, 2003

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
FACTUAL BACKGROUND	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
A. The Arguello Decision Establishes A Tortured And Erroneous Interpretation Of Standing Under Title II	7
B. *Arguello* Conflicts With The Plain Language And Legislative Intent Of Title II	12
CONCLUSION	16

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Arguello v. Conoco, Inc., 330 F.3d 355 (5th Cir. 2003) 5, 14
Ass'n For Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. Of Trustees, 19 F.3d 241 (5th Cir. 1994) 11, 12
Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 9
Desert Palace, Inc. v. Costa, ___ U.S. ___, 123 S.Ct. 2148 (2003) 17
Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268 (D.C. Cir. 1994) 11
Fair Housing Counsel v. Montgomery Newspapers, 141 F.3d 71 (3rd Cir. 1998) 11
Grutter v. Bollinger, ___ U.S. ___, 123 S.Ct. 2325 (2003) 16, 17
Hamm v. City of Rock Hill, 379 U.S. 306 (1964) 6, 11, 14
Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968) 7, 8
Heart of Atlanta, 379 U.S. 241 (1964) 6, 12, 14, 16
Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 14
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 14
Katzenbach v. McClung, 379 U.S. 294 (1964) 6, 9, 10, 13, 14
Kolstad v. American Dental Assoc'n, 527 U.S. 526 (1999) 17
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 8
Los Angeles v. Lyons, 461 U.S. 95 (1983) 7, 10

TABLE OF AUTHORITIES—Continued

Page

N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educational Fund, Inc., 753 F.2d 131 (D.C. Cir.), *cert denied* 472 U.S. 1021 (1985) 7

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 8, 10

O'Shea v. Littleton, 414 U.S. 488 (1974) 7, 8, 11

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, (2000) 17

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 14

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 7

United States v. Dickerson, 530 U.S. 428 (2000) .. 17

United States v. Johnson, 390 U.S. 563 (1968) 14, 15

Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937) 8, 9

FEDERAL STATUTES

42 U.S.C. § 1981 ..... 5, 14, 17

42 U.S.C. § 1983 ..... 10, 11

42 U.S.C. § 2000a 5, 12

42 U.S.C. § 1985 11

OTHER AUTHORITIES

Anne-Marie G. Harris, Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling, 23 B.C. Third World L.J. 1, 22 (2003) 15

IN THE

Supreme Court of the United States

No. 03-342

DENISE ARGUELLO and ALBERTO GOVEA,
Petitioners,

v.

CONOCO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The National Association for the Advancement of Colored People ("NAACP") is a non-profit membership corporation, chartered by the State of New York, tracing its roots to 1909. The NAACP has in excess of 500,000 members and over 2,200 units in the United States and overseas. As the nation's oldest and largest civil rights organization, its principal

[1] This brief is filed with the consent of the Petitioners. A Motion for Leave of Court to File Amicus Curiae Brief is included herewith to address Conoco, Inc.'s lack of consent. No counsel for a party authored this brief in whole or part, and no person or entity other than the NAACP made a monetary contribution to the preparation or submission of this brief.

aims and objectives are clearly set forth in its Constitution as follows:

> To insure the political, educational, social and economic equality of minority group citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; *to seek enactment and enforcement of federal, state and local laws securing civil rights*; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and *to take all lawful action to secure the exercise thereof, and, to take any other lawful action in furtherance of these objectives* consistent with the Articles of Incorporation.

CONSTITUTION OF THE NAACP (Blue Book) Article II Statement of Objectives (emphasis added).

The NAACP has used the legislature and the courts, among others, as primary instruments in its struggle to make real the rights that the Constitution provides for those within the borders of the United States. Reflecting on the important role that Title II of the Civil Rights Act of 1964 has played in its struggle to create a society where people of any race can shop, seek refuge, or convalesce in any venue that is open to the public, the NAACP takes seriously its role in protecting these interests.

In the public accommodations sphere, the NAACP has litigated significant cases in the more distant past and continues to do so in the present. *See e.g. NAACP Conway Branch, et al. v. Shawnee Development Inc., et al.*, No. 4-03-1733-12 (D.S.C. filed May 20, 2003); *NAACP v. Cracker Barrel Old Country Store, Inc.*, No. 4:01-CV-325-HLM (N.D. Ga. filed Apr. 11, 2002); *Gilliam v. HBE Corporation*, No. 99-596-CIV-ORL-22C (M.D. Fla. filed May 1999).

FACTUAL BACKGROUND[2]

Petitioners Denise Arguello (hereinafter "Arguello") and her father, Alberto Govea (hereinafter "Govea") are Hispanic.

On Saturday, March 26, 1995, Arguello and Govea stopped at a Conoco store in Fort Worth, Texas to purchase gas and other items on their way to what would otherwise be a quiet, enjoyable family picnic. Arguello went inside the store to pay for the gas and to purchase beer. Govea also entered the store to buy beer. Arguello and Govea stood in line, where Cindy Smith was waiting on other customers.

Smith rang up Arguello's goods and conveyed the total without seeking identification. When Arguello presented her credit card for payment, Smith immediately said, "I will need to see an ID." Arguello, an Oklahoma resident, presented her valid Oklahoma driver's license. Smith refused to accept it relating, "I'm not going to take that." Arguello asked why. Smith said it was not valid. Arguello explained that it was, but Smith refused.

Govea has high blood pressure and takes medication to control it. During the dispute over Arguello's ID, Govea felt ill, sensed his blood pressure rising, and believed he needed to leave the store to avoid health problems. Govea told Arguello, "Let's just get out of here." He placed his intended purchase on the counter and headed toward the exit.

At this point, Smith relented and accepted Arguello's ID and credit card. When the receipt printed, Smith shoved the receipt towards Arguello to sign. Because of Smith's demeanor, Arguello told Smith that she did not have to take it out on her if she did not like her job. Smith said, "f— you,

---

[2] This highly abridged Factual Background, though not required in *amicus curiae* briefs, is included for ease of reference and to highlight some of the racial hostility to which the Petitioners were subjected while at the Conoco station.

you f—ing Iranian Mexican bitch, whatever you are." Smith said this as she shoved the receipt at Arguello to sign and as Govea was walking away from the counter. At precisely this moment, Arguello realized that Smith had not charged her for Govea's intended purchase and, while she would normally have asked to complete a second transaction she declined to withstand further racially motivated verbal abuse.

After Smith said, "f—you, you f—ing Iranian Mexican bitch," Arguello signed the receipt and gave Smith a copy. Arguello started to leave but realized that she did not have the proper copy of the receipt so she walked back towards the counter. Smith and Arguello exchanged receipts. As Arguello turned away from the counter a second time, Smith, in a rage, shoved a six-pack of beer off the counter towards Arguello. As Arguello walked out of the store, Smith stood by the window and gestured obscenely, something the Petitioners did not reciprocate.

Smith proceeded to use the store's intercom to broadcast: "go back where you came from, you poor Mexicans" and called the Petitioners "goat smelling Iranians." Arguello's three young children, among others, could hear Smith yelling over the intercom. When Govea attempted to reenter the store in response to Conoco officials' request that Petitioners identify the store clerk in question, Smith locked him out while permitting white patrons to enter the store. In response to Govea's inquiry regarding whether Smith was discriminating against them, Smith responded in the affirmative. During the period after the incident but before Arguello and Govea filed suit, the Petitioners repeatedly contacted Conoco managers to lodge their complaints both verbally and in writing. Conoco summarily rebuffed Petitioners' efforts. The company neither apologized nor responded. To make matters worse, the record is devoid of any attempts by Conoco to obviate the need for injunctive relief by

implementing a policy against discrimination in response to the incident.

According to the Fifth Circuit, none of the conduct alleged in the complaint and proven at trial affected Petitioners' rights, as protected by 42 U.S.C. § 1981 and 42 U.S.C. § 2000a ("Title II"). The Fifth Circuit found that while the store clerk may have deterred Arguello and Govea, she did not prevent either from contracting under the same terms and conditions as white customers. *See Arguello v. Conoco, Inc.*, 330 F.3d 355, 359-360 (5th Cir. 2003). The court also held that neither Petitioner had standing to seek injunctive relief under Title II because neither had any professed intention of returning to that Conoco. *Id.* at 361.

SUMMARY OF THE ARGUMENT

Arguello and Govea pray for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on May 5, 2003. *See Arguello v. Conoco, Inc.*, 330 F.3d 355 (5th Cir. 2003). The NAACP supports the Petition for Writ of Certiorari ("Petition") because it presents substantial questions concerning fundamental civil rights laws that the NAACP relies upon in pursuing its goal of a more egalitarian society.

The Fifth Circuit's decision in *Arguello v. Conoco*, 330 F.3d 355 (5th Cir. 2003) stands out as an anomaly in Title II jurisprudence. It is not a case where mere petty frustrations experienced by paying customers are made fodder for litigation. To the contrary, it was clear to Arguello, Govea, the trial judge and the jury below that Smith treated the plaintiffs poorly precisely because they were Hispanic. Indeed, during the encounter Smith admitted as much. This case is one of those rare species in modern civil rights practice where the discriminator provides the victims with her motive—a case of direct evidence. Despite its acknowledgement of this evidence and the havoc it wreaked on

Arguello and Govea, the Fifth Circuit rendered a decision that permits what Congress and this Court's precedents prohibit. It is incumbent upon this Court to "finally close one door on a bitter chapter in American history" by granting certiorari and reversing the Fifth Circuit's decision in *Arguello*. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 280 (1964) (concurring opinion of Justice Douglas).

Specifically, the Court should grant the Petition for two primary reasons. First, the Fifth Circuit's construction of standing to pursue an injunction under Title II is heavily flawed and contrary to this Court's Title II jurisprudence. Second, the decision is contrary to the text and legislative purpose of Title II and, if permitted to stand, will make conduct of the sort Conoco exhibited immune from injunctive relief in Texas, Louisiana and Mississippi as well as other jurisdictions in which the *Arguello* decision curries favor.

ARGUMENT

This Court first addressed Title II in *Heart of Atlanta Hotel, Inc. v. U.S.*, 379 U.S. 241, 85 S.Ct. 348 (1964), *Hamm v. City of Rock Hill*, 379 U.S. 306, 85 S.Ct. 384 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377 (1964). In *Heart of Atlanta*, this Court used the Commerce Clause to uphold the constitutionality of Title II. *See Heart of Atlanta*, 379 U.S. at 262 ("[w]e, therefore conclude that the action of Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years").[3] The very same

[3] It bears repeating that Arguello is a Tulsa, Oklahoma resident who was visiting her parents in Fort Worth, Texas when the encounter at Conoco occurred. *See* Petition for Certiorari, Appendix J at 45a; *see also*, Petition for Certiorari, Appendix A, at 2a ("Arguello, an Oklahoma resident, presented Smith with her valid Oklahoma driver's license"). Under the circumstances, Arguello is clearly within the class of transient

day, in *Hamm*, the Court overturned state court convictions in Arkansas and South Carolina based on conduct that occurred prior to the passage of Title II of the Civil Rights Act of 1964, but that was prosecuted after its effective date.[4] The various holdings of these extremely important cases will be for naught, however, if the *Arguello* decision is permitted to stand despite its improper construction of Title II standing and its complete disregard for the text and legislative intent of the statute.

A. The Arguello Decision Establishes A Tortured And Erroneous Interpretation Of Standing Under Title II.

In a pithy four paragraph response to the Petitioners' appeal concerning the judgment in favor of the Respondent on the public accommodations claims, the Fifth Circuit ruled that Arguello and Govea lacked standing to assert their claims under the doctrine of City of *Los Angeles v. Lyons*, 461 U.S. 95 (1983) and its progeny.

It is clear beyond cavil that Congress has the power to "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *O'Shea v. Littleton*, 414 U.S. 488, 495, n.2 (1974) (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., Concurring); *Hardin v.*

---

persons that Title II seeks to protect. *See e.g. Katzenbach*, 379 U.S. at 299-300 (citing congressional testimony for the proposition that the discrimination Title II renders illegal "obviously discourages travel and obstructs interstate commerce").

[4] Constance Baker Motley and Jack Greenberg represented the petitioners in *Hamm*. Significantly, Ms. Motley and Mr. Greenberg were NAACP Legal Defense & Educational Fund (hereinafter "LDF") attorneys. LDF is former affiliate of the National Association for the Advancement of Colored People. *See N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educational Fund, Inc.*, 753 F.2d 131 (D.C. Cir.), *cert* denied 472 U.S. 1021, 105 S.Ct. 3489 (1985).

Kentucky Utilities Co., 390 U.S. 1, 6 (1968); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973). This power is checked by Article III's requirement that an "invasion of the statutory right *has occurred or* is likely to occur." *O'Shea*, 414 U.S. at 495, n.2. Where Congress has properly exercised its authority to legislate pursuant to whatever constitutional provision is applicable (e.g. pursuant to the Commerce Clause or the Fourteenth Amendment) and a violation of the statute occurs, standing is conferred upon the injured party.

Title II prohibits race discrimination and other types of discrimination in places of public accommodation. The reality of Title II is that it is a statute aimed entirely at providing injunctive relief to plaintiffs and the class of citizens similarly situated. As this court observed in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966 (1968):

> When a plaintiff brings an action under [Title II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.

Id. (citations omitted).

The clear import of the Court's opinion in *Newman* is that injunctive relief pursuant to Title II favors not only the individual plaintiff, but also the class of individuals similarly situated. Under the circumstances, the Fifth Circuit's reasoning in *Arguello* that plaintiffs had to show some likelihood that they, themselves, would be harmed in the absence of an injunction, is heavily flawed as courts sitting in equity have greater latitude to grant injunctive relief "in furtherance of the public interest . . . than when only private interests are involved." *Virginian Ry. Co. v. System Feder-*

ation No. 40, 300 U.S. 515, 552 (1937) (citations omitted).[5] Indeed, injunctive relief in *Arguello* would presumably have entailed mandating that Conoco implement a non-discrimination policy that has heretofore been absent. Injunctive relief would likely have included mandatory training on cultural sensitivities and anti-discrimination laws. Such an injunction would have countless beneficiaries of all races from both within and without Conoco.

In *Katzenbach*, the Court realized the constitutional import of the various Title II cases before it and declined the United States' effort to have the matter dismissed on prudential grounds. As succinctly stated by the Court,

> [t]he appellants [Attorney General Nicholas deB. Katzenbach and others] moved in the District Court to dismiss the complaint for want of equity jurisdiction and that claim is pressed here. The grounds are that the Act authorizes only preventive relief; that *there has been no threat of enforcement against the appellees and that they have alleged no irreparable injury.*

Katzenbach, 379 U.S. at 295 (emphasis added).

After reciting a laundry list of reasons why the case might not be heard, including the fact that Title II includes a statutory proceeding for a determination of rights and duties, the Court went on to note that, "[i]t is important that a decision on the constitutionality of the Act as applied in these cases be announced as quickly as possible." *Katzenbach*, 379 U.S. at 296. Thereafter, the Court proceeded to decide the merits of Ollie McClung's challenge to the constitutionality

---

[5] Since Article III standing is a matter for the Court to determine **and** because Congress already created Title II as a tool for those denied access or full enjoyment of public accommodations on the basis of race, this is not a case in which the Court can refer putative Title II plaintiffs to the legislature for prospective recourse. *Cf. Groupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999).

of Title II as applied to his restaurant, "Ollie's Barbecue." *Id.* Hence, in *Katzenbach*, the Court did not shy away from its responsibility to interpret the constitutionality of Title II. Similarly, in this case, the Court should determine whether standing to assert a Title II claim is on par with standing to assert a claim against future use of life threatening police holds under 42 U.S.C. § 1983. *See, City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

The *Arguello* decision poses a significant disincentive to civil rights advocates and their lawyers to even bring Title II cases. When it serves as a plaintiff in litigation, the NAACP's principle aim is to obtain injunctive relief. This Court observed in *Newman* that at the time of its passage, it was presumed that enforcement of Title II "would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Newman*, 390 U.S. at 401. However, in the wake of *Arguello*, groups like the NAACP will be hard pressed to encourage experienced and able counsel to assist them in bringing Title II claims even in the most egregious of circumstances. Yet when the United States Department of Justice has only filed approximately twelve Title II pattern and practice cases since 1998[6] and the NAACP cannot take on every alleged offender, it is simply improper to require individual plaintiffs to prove a likelihood of future injury in order to prevail.

The NAACP notes that *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), is inapplicable to Title II claims. While it is clear that *Katzenbach* and *Newman* predated *Lyons*, it is equally clear that the Court's decision in *Lyons* is inapposite

---

[6] *See* United States Department of Justice Civil Rights Division, Housing and Civil Enforcement Section CASES, available at http://www.usdoj.gov/crt/housing/caselist.htm (last visited September 29, 2003) (summarizing thirteen cases brought under Title II, the oldest of which, against Denny's, Inc., was brought in 1993).

to claims of public accommodations discrimination under Title II. Title II claims seeking an injunction barring race discrimination, the only remedy provided by the Act, are patently different from claims brought under 42 U.S.C. § 1983, in part, because they do not concern issues of federalism. Along this same vein, *Lyons* relied heavily upon this Court's decision in *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974), another case involving the delicate balance between federal and state spheres of influence. In *O'Shea*, there was neither a claim of past injury to the named plaintiffs, nor claims of the continuing effects of past injuries. In addition, whereas in *O'Shea*, the Court declined to issue injunctions of state court prosecutions pursuant to 42 U.S.C. §§ 1981, 1983 and 1985, it observed no such standing infirmities in permitting injunctions barring state court prosecutions pursuant to Title II in *Hamm*. *Compare*, *O'Shea*, 414 U.S. at 493 ("[t]he complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of the federal courts must allege an actual case or controversy") with *Hamm*, 379 U.S. at 308 ("[w]e hold that the convictions must be vacated and the prosecutions dismissed."). Moreover, unlike plaintiffs in 42 U.S.C. § 1983 cases, the victim of discrimination encountered in a covered public accommodation seeks an injunction in her capacity as a 'private attorney general' on behalf herself and others similarly situated even when the case is not styled as a class action.

Finally, there are a growing number of cases challenging associations like the NAACP's representative standing on grounds that the injuries sustained by the organizations are self-inflicted. *See e.g. Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994); *Fair Housing Counsel v. Montgomery Newspapers*, 141 F.3d 71, 80 (3rd Cir. 1998); *Ass'n For Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. Of Trustees*, 19 F.3d 241, 244 (5th Cir.

1994). The theory asserts that organizations cannot allege deprivation of resources and frustration of purpose as grounds for standing when they know, going into an investigation or litigation, that a given putative defendant discriminates or is likely to discriminate on grounds of race. According to these cases, such 'self-inflicted' injuries are not actionable. In *Arguello*, we see the flip side of that argument where individuals are denied the right to seek injunctive relief because they testify honestly about the likelihood of visiting a place of public accommodations that, based on their personal experience, they know discriminates against members of their race. Thus, the *Arguello* decision presents one side of a cruel Hobson's choice for those seeking to address Title II claims between bringing cases as individuals and *lying* or as institutions and *losing*.

B. Arguello Conflicts With The Plain Language And Legislative Intent Of Title II.

The text of Title II of the Civil Rights Act of 1964 provides ample support for the construction that Petitioners are pressing in the petition for writ of certiorari. Section 201(a) of the Act provides that:

> All persons shall be entitled to the *full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations* of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Section 201(a) (emphasis added).

In addition, § 2000a-2 states that "[n]o person shall withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive any person" of the rights enumerated in the statute. Section 2000a-3(a) provides that "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice

prohibited by section 2000a-2 . . . , a civil action for preventive relief, including an application for a permanent or temporary injunction . . . may be instituted by the person aggrieved." In short, as this Court succinctly put it, "Section 201(a) of Title II commands that all persons shall be entitled to the full and equal enjoyment of the goods and services of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin." *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964).

At bare minimum, the "full enjoyment" of a "privilege" of shopping in a convenience store operated in conjunction with a gas station should include the right to be free from overt race discrimination and a barrage of racially derogatory insults. Permitting public accommodations to harangue Hispanics, African Americans or other individuals on the basis of race so long as the victims lack an immediate intention to return or a likelihood of returning runs completely contrary to Title II. Had Congress only been concerned with retail recidivism, it would not have accentuated that it was protecting the 'Negro' right to interstate travel. *See Heart of Atlanta*, 379 U.S. at 252-253 (citations omitted). It strains credulity to assume that the drafters of the house and senate bills that ultimately became Title II would take a charitable view of Conoco's conduct towards Arguello and Govea because if it is permitted to continue unabated it will have "a qualitative as well as quantitative effect on interstate travel" by Hispanics. *Heart of Atlanta*, 379 U.S. at 253. It is an even greater strain to imagine that the congress that passed Title II might find Conoco's conduct outside of the ambit of the statute.

To be sure, notwithstanding the NAACP's mandate, race discrimination is not, by its mere existence, actionable unless the conduct challenged violates an existing statute or constitutional provision. Here, Conoco's conduct violated Title II because it clearly discriminated against Arguello and

Govea on the ground that they are Hispanic. In its decision, however, the *Arguello* court created a loophole that threatens to swallow Title II in its entirety. Moreover, by construing the unambiguous language of Title II of the Civil Rights Act of 1964 *in pari materia* with the provisions of 42 U.S.C. § 1981 of Civil Rights Act of 1866, as amended, the Fifth Circuit conflated the aims of two very different statutes and their respective standards of proof. *Compare Arguello*, 330 F.3d at 361 ("if Arguello and Govea have no cause of action under § 1981, they have no closer relationship to future conduct than does any member of the general public"); with *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 provides a separate remedy for housing discrimination from the Fair Housing Act, 42 U.S.C. §§ 3601-3631); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237-238 (1960) (holding that a § 1982 claim is not subject to the administrative requirements of the Civil Rights Act of 1964 because the acts provided for separate forms of recovery); *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) (holding that Title VII of the Civil Rights Act of 1964 and § 1981 create two separate actions, are subject to different procedures and create different remedies though both may apply to a given situation). In sum, this Court has never been so cavalier in its treatment of the relationship between the various civil rights statutes.

In construing the provisions of Title II, this Court has repeatedly looked to the legislative history of the statute to determine congressional intent. *See e.g. Hamm*, 379 U.S. at 310-311 and 315; *see also Hamm* 379 U.S. at 317 (Justices Douglas and Goldberg, concurring); *Heart of Atlanta*, 379 U.S. at 245-246, 249-250 and 252-253; *Katzenbach*, 379 U.S. at 299-300 and 303-304; *United States v. Johnson*, 390 U.S. 563, 564-565 (1968). That history includes Congress' recognition that the purpose of the legislation was to "make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly

open to the general public." H.R. Rep. No. 88-914 (1963), reprinted in 1964 U.S.C.C.A.N. 2455, 2393-94; *see also*, Anne-Marie G. Harris, Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling, 23 B.C. Third World L.J. 1, 22 (2003). As one Senator observed:

> The truth is that *the affronts* and denials that this section, if enacted, would correct *are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity.*

S. Rep. No. 88-872 (1964), reprinted in 1964 U.S.C.C.A.N. 2355, 2369 (emphasis added).

In one of its many passes at the legislative history of Title II, this Court credited Senator Young's statement that "[t]he enforcement provisions of title [sic] II are based on the specific prohibition in section 203 against denying *or interfering with* the right to the nondiscriminatory use of facilities covered by the title." *United States v. Johnson*, 390 U.S. at 565, citing 110 Cong.Rec. 7384 (emphasis supplied). It is beyond dispute that Smith, in her capacity as a Conoco employee, interfered with the Petitioners' nondiscriminatory use of the gas station and attendant convenience store. By denying Petitioners' claims for injunctive relief in the face of volumes of direct evidence of race discrimination and an unrepentant corporate discriminator, the Fifth Circuit ignored this Court's precedents and effectively sounded the death knell for Title II enforcement in Texas, Mississippi and Louisiana.[7]

---

[7] The NAACP takes for granted that Conoco lacks a non-discrimination policy and is therefore confident in its assertion that Respondent is unrepentant. As the District Court observed, "[t]here is no policy by the defendant involved. There is no policy saying discriminate, there is no policy saying, don't discriminate. I suppose that's as broad as it is long." Petition for Certiorari, Appendix at 32a-33a.

As further evidence of the public policy aims of Title II, Justice Black's concurrence in Heart of Atlanta is quite insightful. Referencing Bureau of Census data and the congressional record, Justice Black observed:

> There are approximately 20,000,000 Negroes in our country. Many of them are able to, and do, travel among the States in automobiles. Certainly it would seriously discourage such travel by them if, as evidence before the Congress indicated has been true in the past, they should in the future continue to be unable to find a decent place along their way in which to lodge or eat.

Heart of Atlanta, 379 U.S. 275-276 (concurrence of Justice Black) (internal citations omitted).

Justice Black's observations in 1964 are quite poignant when considered in conjunction with the fact that today there are approximately 36,275,303 individuals of Hispanic or Latino origin in addition to 38,318,939 black or African American individuals residing in the United States.[8] Moreover, the likelihood that these minorities will own and drive cars between and among the states has increased exponentially since 1964 when this Court decided *Heart of Atlanta*. Under the circumstances, the availability of gas stations willing to serve minorities in a manner that eschews outright verbal and physical racial hostility is not only appropriate, but necessary.

CONCLUSION

In recent years, this Court has granted certiorari to uphold the principle of *stare decisis* in its Equal Protection jurisprudence, *Grutter v. Bollinger*, ___ U.S. ___, 123 S.Ct. 2325

---

[8] *See* Bureau of the Census, July 1, 2002 Population Estimates, available at http://eire.census.gov/popest/data/states/ST-EST2002-ASRO-04.php (last visited September 24, 2003).

(2003) (upholding Sixth Circuit's application *Bakke's* diversity rationale for racially based affirmative action in university admissions), and to resolve circuit conflicts in favor of the construction of a civil rights statute's plain language. *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148 (2003) (affirming 9th Circuit's construction of plain language of the Civil Rights Act of 1991 to permit a plaintiff-friendly mixed-motive jury instruction even in the absence of direct evidence of discrimination). In still other instances, this Court has intervened in cases where lower courts have engaged in judicial activism to roll back significant civil and constitutional rights gains. *See e.g. Reeves v. Sanderson Plumbing Search Term End Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000) (eradicating some circuits' pretext plus methodology for evaluating dispositive motions in Title VII cases); *Kolstad v. American Dental Assoc'n*, 527 U.S. 526, 119 S.Ct. 2118 (1999) (using plain language approach to Civil Rights Act of 1991 to reverse D.C. Circuit's erroneous construction of punitive damages provisions of Title VII, 42 U.S.C. § 1981a, as requiring showing of 'egregiousness'); *United States v. Dickerson*, 530 U.S. 428, 120 S.Ct. 2326 (2000) (reversing Fourth Circuit's attempted overruling of *Miranda* purportedly by virtue of 18 U.S.C. § 3501).

The time to reign in an errant Circuit Court decision while providing guidance as to the appropriate construction of a statute is once again upon us. The NAACP supports the present petition for certiorari because the Fifth Circuit's decision with respect to Petitioners' 42 U.S.C. §§ 1981 and 2000a claims is at odds with the plain language of both statutes and contrary to the law as applied by this Court.[9]

---

[9] While the 42 U.S.C. § 1981 claim is beyond the scope of this amicus brief, the NAACP hereby adopts the arguments of both the Petitioners and the Lawyers' Committee for Civil Rights Under Law.

The NAACP respectfully prays that the Court grant the Petition for Writ of Certiorari as to both questions 1 and 2. While this amicus brief is limited to addressing the Petitioners' Title II public accommodations claims, it is generally recognized that the Fifth Circuit erred as to all of the Petitioners' claims. Should the Court deny the Petition, individuals subjected to overt, unabashed and highly egregious racism in the context of seeking accommodations in places admittedly covered by Title II will lack any of the protections provided by Congress. Moreover, if the Court denies the Petition, civil rights plaintiffs throughout the Nation will be hard pressed to resurrect Title II as a viable means of effectuating the anti-discrimination imperatives of the Civil Rights Act of 1964 and courts unsympathetic with the aim of Title II will be emboldened to ignore the statute and this Court's precedents which apply it.

Respectfully submitted,

DENNIS COURTLAND HAYES *
ANGELA CICCOLO
HANNIBAL WILLIAMS II KEMERER
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland
(410) 580-5777

* Counsel of Record

October 6, 2003